STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED September 16, 2014
v	No. 316803 Wayne Circuit Court
DEMETRIUS FOSTER, Defendant-Appellee.	LC No. 99-006195-FC

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

The prosecution appeals as of right from an order dismissing, without prejudice, charges of second-degree murder,[1] and possession of a firearm during the commission of a felony (felony-firearm),[2] against Demetrius Foster because no complaining witness appeared at Foster's scheduled retrial on these charges. We affirm.

In 1999, Foster was charged with first-degree premeditated murder,[3] and felony-firearm in connection with the fatal shooting of Bobby Morris on November 17, 1998. In 2000, a jury convicted Foster of second-degree murder and felony-firearm. The trial court sentenced Foster, as a third habitual offender,[4] to consecutive prison terms of 30 to 50 years for the murder conviction and two years for the felony-firearm conviction. This Court affirmed the convictions and sentences.[5]

In 2012, the Sixth Circuit Court of Appeals granted a conditional writ of habeas corpus based on its determination that Foster's trial counsel was ineffective for failing to raise and

[1] MCL 750.317.

[2] MCL 750.227b.

[3] MCL 750.316(1)(a).

[4] MCL 769.11.

[5] *People v Foster*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2003 (Docket No. 226311).

investigate an alibi defense.[6] The court gave the state of Michigan 180 days to retry Foster or release him from custody,[7] but later stayed its mandate pending the filing and resolution of a petition for writ of certiorari with the United States Supreme Court. In March 2013, the United States Supreme Court denied the petition for writ of certiorari.[8]

Foster's retrial was scheduled for May 28, 2013. On that date, the prosecutor informed the trial court that he was not ready to proceed because he was waiting for the officer in charge, Sergeant Glenn Davis, to arrive with updated information regarding the status of the witnesses. The prosecutor asked the court for an adjournment "if my witnesses are not here" and requested witness detainers for evasive witnesses. The trial court responded that any request for a detainer or an adjournment was untimely, considering that it had previously urged the prosecution to contact witnesses. The prosecutor alternatively proposed that Sergeant Davis be allowed to describe his efforts to locate witnesses and, if due diligence was shown, to allow transcripts of prior testimony to be read into evidence. The trial court agreed that this would be appropriate.

Following a brief recess, the prosecutor indicated that Sergeant Davis had arrived, but there were no witnesses present. Sergeant Davis indicated that he had obtained witness subpoenas from the prosecution on May 21, 2013, and that he was only able to serve Deborah Hollins and a police officer with subpoenas.[9] The prosecutor indicated that the subpoenas had been sent to Sergeant Davis earlier, but "there's obviously been a breakdown in requesting subpoenas from the prosecutor's office to the officer in charge." Ultimately, the prosecutor stated, "It's your decision, Judge, as to how we proceed in this matter." The prosecutor reiterated that he had no witnesses and was not ready to proceed. The trial court then granted a defense motion for dismissal, without prejudice, based on the failure of any complaining witnesses to appear.

The prosecution now argues on appeal that the trial court's refusal to grant an adjournment constituted a "per se" abuse of discretion because one witness, Hollins, could have made out the prosecution's entire case. The prosecution argues that it was entitled to a least a brief adjournment under *People v Jackson*,[10] to secure this critical witness's appearance,[11] because the witness was properly served with a subpoena and failed to appear at the retrial. We disagree.

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[6] *Foster v Wolfenbarger*, 687 F3d 702, 704, 710 (CA 6, 2012).

[7] *Id*.

[8] *Wolfenbarger v Foster*, ___ US ___; 133 S Ct 1580; 185 L Ed 2d 576 (2013).

[9] Although Foster asserts that the prosecution had 22 witnesses, the trial court's final pretrial conference summary, dated March 21, 2013, indicates that the prosecution had only 12 witnesses.

[10] 467 Mich 272; 650 NW2d 665 (2002).

[11] According to this Court's prior opinion, Hollins was the only witness at Foster's first trial who identified Foster as the person who shot Morris. *Foster*, unpub op at 2, 4.

Initially, we reject Foster's argument that the prosecutor waived this issue. Waiver is "the intentional relinquishment or abandonment of a known right."[12] A party waives an error if its counsel expressly approves of or acquiesces to a trial court's action.[13] The record establishes that the prosecutor did not acquiesce to the trial court's decision not to order an adjournment. At best, the prosecutor made a premature motion for an adjournment before Sergeant Davis arrived to provide updated information regarding the status of witnesses, and failed to ask the court to revisit this issue after Sergeant Davis disclosed that he had not received witness subpoenas from the prosecution until one week before the retrial.

The prosecution's claim is, however, unpreserved.[14] On appeal, the prosecution is pursuing a specific basis for an adjournment that was not presented to the trial court, namely, that an adjournment should have been granted to secure Hollins's appearance. "We review unpreserved errors for plain error affecting substantial rights."[15]

A party's motion for an adjournment must be supported by good cause.[16] Further, where the motion is based on the unavailability of a witness or evidence, the trial court may grant the motion only where the evidence is material and diligent efforts were made to produce the witness or evidence.[17]

In *Jackson*,[18] our Supreme Court held that the trial court abused its discretion in denying a prosecutor's motion to adjourn trial for the purpose of producing a key subpoenaed witness who failed to appear at trial where the trial court did not articulate a clear basis for its decision, the subpoenaed witness previously cooperated with the police and prosecution, and there was no reason to expect that the cooperation would not continue. Contrary to the prosecution's argument on appeal, the Supreme Court in *Jackson* did not hold that a party issuing a subpoena has an absolute right to at least a brief adjournment when a subpoenaed witness fails to appear. Rather, the Court found an abuse of discretion under the circumstances presented in that case.[19]

In this case, the prosecutor identified Hollins as a witness who was served with a subpoena, but did not argue that Hollins was a material witness. Even if the trial court should

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[12] *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citation and quotation marks omitted).

[13] *Id.* at 216; *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

[14] See *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011) ("Generally, an issue is not properly preserved unless a party raises the issue before the trial court and the trial court addresses and decides the issue.").

[15] *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612 (2014).

[16] *Jackson*, 467 Mich at 276, citing MCR 2.503(B)(1).

[17] MCR 2.503(C)(2); *Jackson*, 467 Mich at 276-277.

[18] 467 Mich at 277-279.

[19] *Id.* at 273.

have known that Hollins was a material witness based on the prior trial, the prosecutor did not argue to the court that he could proceed solely on the basis of Hollins's testimony. The prosecutor made no distinction between "witnesses" when requesting an adjournment "if my witnesses are not here." Even after Sergeant Davis arrived with the updated witness information, the prosecutor did not make this distinction.

Given that the prosecution does not argue on appeal that it was diligent in locating witnesses who were not served with a subpoena to appear at the retrial and the indication in the record that the prosecutor was not seeking to proceed solely on the basis of Hollins's testimony or the testimony of both subpoenaed witnesses and Sergeant Davis, the prosecution did not satisfy the requirements of materiality and diligent efforts.[20] Thus, the trial court did not plainly err in dismissing the case, rather than ordering an adjournment.[21]

Affirmed.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

[20] See MCR 2.503(C)(2).

[21] See *Chelmicki*, 305 Mich App at 62.